fits are, before the time has arrived when he can compel specific performance. First, he is not entitled to possession, except by special contract, and then he usually pays an extra consideration, and becomes virtually a tenant.[10] The vendor or his heir, therefore, is entitled to the rents and profits.[11]

Second, he is neither in the position of a mortgagor or of a *cestui que* trust, though many cases infer that he is, and on that basis decide that he ought to bear the loss. The vendor has a beneficial interest, namely, the right to the rents and profits, which the trustee and the mortgagee, generally speaking, have not, and, conversely, the vendee has not the beneficial interest which the *cestui que* trust and the mortgagor have. In the absence of recording acts, the vendee is at the mercy of the *bona fide* purchaser for value and without notice, while the mortgagor at least, in the American form of mortgage, is not. It is a strange misuse of language to call one who can neither have the use of certain premises in the present, nor be certain of having it in the future, the beneficial owner of those premises.

It is therefore suggested that the rule stated in the beginning ought to be amended as follows:

"The risk of loss by accidental injury to or destruction of the property is upon the buyer from the moment that the latter has it in his power to demand and get specific performance of the contract."

CUSTOM AS AN APPARENT EXCUSE FOR NEGLIGENCE.

In the recent case of *Korab v. Chicago, R. I. & P. R. Co.*, 143 N. W., 876 (Iowa), it was held not error to refuse an instruction to the effect that where the undisputed evidence showed that railroads at the time of the accident used both blocked and unblocked frogs, and that it was questionable which was the safer for the business of the roads, then the use of the unblocked frog was not negligence.

This is a question upon which there is much difference of opinion in the courts. Perhaps it will be helpful at the outset of the discussion to ascertain just what negligence consists of.

The best definition of negligence is that of Judge Cooley,[1] who

[10] *Clinton v. Hope Ins. Co.*, 45 N. Y., 454.

[11] *Lumsden v. Fraser*, 12 Simons, 263; *Cyc.*, Vol. 39, p. 1629, pp. c., and cases cited.

[1] *Cooley on Torts*, 3d. Ed., Vol. 2, p. 1324.

states that negligence is "the failure to observe, for the protection of the interests of another person, that degree of care, precaution, or vigilance which the circumstances justly demand, whereby such other person suffers injury." This has been widely adopted,[2] and it has been generally held that the question whether a given state of facts falls within this definition is a question of fact for the jury and if there is any evidence upon which the jury might find for the plaintiff, the question of negligence must be submitted to them.[3]

So if the evidence is conflicting the jury must decide whether negligence is present or not.[4] Since, therefore negligence is determined, to put it shortly, by the measure of due care, that care is a fact to be weighed by the jury in each case.[5]

It is conceded as a general rule that evidence that an instrumentality was or was not in common use is competent *as tending to show* whether or not the defendant was in the exercise of due care.[6] This seems reasonable and fair, since it is evidence of what others as a class do in similar businesses, which are presumably conducted in a normal and cautious manner. However, it is held in many jurisdictions that evidence of a custom cannot ever be regarded as conclusively establishing lack of negligence.[7] This holding, we respectfully submit, states the correct rule.

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[2] *Barret v. So. Pac. R. Co.*, 91 Cal., 296; *Fisher v. New Bern*, 140 N. C., 506; *Black v. Virginia Portland Cement Co.*, 104 Va., 450.

[3] *Chicago R. Co. v. Maloney*, 99 Ill., 623; *Powers v. Pere Marquette R. Co.*, 143 Mich., 379; *Baulec v. New York Central R. Co.*, 59 N. Y., 356.

[4] *Price v. St. Louis*, 75 Ark., 479; *Central Pass R. Co. v. Chattanooga*, 17 Ky. Law Rep., 5; *McIntyre v. Detroit Safe Co.*, 129 Mich., 385; *Swift v. Staten Island R. Co.*, 123 N. Y., 645.

[5] *Littlefield v. Biddeford*, 29 Me., 310; *Grand Trunk R. Co. v. State*, 144 U. S., 408; *Augusta v. Killian*, 79 Ga., 234.

[6] *Labbatt on Master and Servant*, Vol. I, par. 44; *Wabash R. Co. v. McDaniels*, 107 U. S., 454; *Meyers v. Hudson Iron Co.*, 150 Mass., 130; *Austin v. Chicago, R. I. & P. R. Co.*, 93 Iowa, 236; *Pennsylvania Co. v. Hankey*, 93 Ill., 580.

[7] *Cass v. Boston, etc., R. Co.*, 14 Allen. (Mass.), 448; *Derosia v. Winona R. Co.*, 18 Minn., 133; *Wabash R. Co. v. McDaniels, supra*; *Martin v. California C. R. Co.*, 94 Cal., 326; *McCormick Harvesting Co. v. Burandt*, 136 Ill., 170; but see *Camp Point Mfg. Co. v. Ballow*, 71 Ill., 417; *Hosic v. Chicago, R. I. & P. R. Co.*, 75 Iowa, 683; *Sawyer v. Arnold Shoe Co.*, 90 Me., 369; *Craver v. Christian*, 36 Minn., 413; *Reichla v. Gruensfelder*, 52 Mo. App., 43; *Lowrimore v. Paliver Mfg. Co.*, 60 S. C., 153; *Sincere v. Union Compress & Warehouse Co.*, 40 S. W., 326.

As said by Willes, J., in a leading English case, "no usage could establish that what in fact is unnecessarily dangerous was in law reasonably safe against those toward whom there was a duty to be reasonably careful"[8] The custom relied on may, in truth, be a negligent one. Shall one be heard to say that because others have been negligent he may be so too, and not under a liability, merely because he has followed the flock? Such a holding would seem a clear invasion of the province of the jury to pass upon questions of fact.

Now if the rule contended for be correct, it must apply to the case in hand. If one custom is not conclusive as to negligence, it does not alter matters that there are two, for both may be such courses of proceeding as to be negligent. Therefore the case under consideration is not distinguishable in principle from those cited *supra* in note 7.

Nevertheless, plain as this may seem, the numerical weight of authority takes the contrary view; is opposed to the case under discussion and holds that when one has followed such a custom he is, as a matter of law, not chargeable with negligence.[9]

Thus the Nebraska court under a state of facts exactly similar to the case under discussion held the defendant railroad company freed from negligence as a matter of law, and said "that it was not a case analogous to that of supplying defective machinery or of omitting to use a device generally approved but a mere error of judgment.[10] Why it is not analogous we fail to see. Half the railroads in the country may use instrumentalities so defective that they are chargeable with negligence, yet that would constitute a custom and be using a generally approved device. Also we are of opinion that there may be an error in judgment so gross as to render one liable.

In Pennsylvania an extreme doctrine exists. There it has been held that reasonably safe appliances mean safe according to the usage of the business and that this must establish the standard of care. The court has said that no jury can say that the ordinary way of doing things is a negligent way. We may well ask what

[8] *Inderman v. Dames,* L. R. 1 C. P., 274.

[9] *Kehler v. Schwenk,* 144 Pa. St., 348; *Bohn v. Chicago, R. I. & P. R. Co.,* 106 Mo., 429; *King v. Ford River Lumber C.o,* 93 Mich., 172; *Davis v. Augusta Factory Co.,* 92 Ga., 712; *Baylor v. Delaware, L. & W. R. Co.,* 40 N. J. L., 410; *Washington Asphalt Co. v. Mackey,* 15 App. D. C., 410; *Saffenfield v. Main St. & Agri. Park R. Co.,* 91 Cal., 48.

[10] *O'Neill v. C. R. I. & P. R. Co.,* 66 Neb., 638.

is a jury for but to determine such matters? The standard of care must vary with varying circumstances. Some one must apply the test of negligence to the facts and no rule of law can be so framed to cover every possible contingency so that the jury may be relieved from their duty of determining the question of negligence involved.

This same court, in a somewhat later case than the one noticed,[11] held, where a city was sued for damages, claimed for a fall into an areaway, which protruded into the street, that "no usage could justify an encroachment on a public highway," and held evidence of custom inadmissable on the question of negligence.[12]

But the court remarked, in the course of the opinion, that the evidence offered of the custom of having these areaways did not show that the other areaways were exactly similar to the one in question, in that they did not protrude into the street. It seems doubtful whether the cases are reconcilable. The doctrine of the earlier case has been re-affirmed in so far as it applies to cases in which the public are not directly concerned at least.[13]

The New York court, in passing upon a similar question, stated "that if the doctrine of the majority were not adopted someone could always be found to testify that there was a better appliance than the one used and that, therefore, the defendant would always be liable.[14] This conclusion seems erroneous, since in order to avoid being negligent one does not have to use the best appliances, but only proper ones,[15] and it does not follow that he will be liable simply because there may be a better appliance in existence than the one he uses.

A more formidable objection is advanced in Michigan,[16] namely, that a jury verdict in a case like the principal one would be no protection to the defendant, for a verdict makes no precedent and another jury on precisely the same state of facts may reach the opposite conclusion. So if there were a later suit against the defendant in which he was attacked for rejecting the same appliance which he had just been held liable for adopting there might be a finding against him in both instances.

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[11] *Titus v. Bradford B. K. R. Co.*, 136 Pa. St., 618; *Reese v. Hershey*, 163 Pa. St., 253.

[12] *McNerney v. Reading*, 150 Pa. St., 611.

[13] *Reese v. Hershey, supra.*

[14] *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y., 31.

[15] *Titus v. Bradford, supra.*

[16] *McGinnis v. Canada So. Bridge Co.*, 49 Mich., 472.

To this the obvious answer is that the cause of such a result lies in a defect of our jury system and not in the law, that such an objection is applicable to any succession of civil suits, and that there is no more reason to establish an artificial standard of care in the given case than in any other.

The Arkansas authorities are of the opinion that they can conceive of no other way of determining what ordinary care is than by ascertaining what men of prudence do in like circumstances.[17] This ignores the possibility of expert testimony from well-informed railroad men and would be a rather negligible objection.

It remains to be noticed that the Supreme Court of the United States has held that such an instruction as that asked for in the principal case should have been given and it was even decided that the defendant was entitled to a pre-emptory instruction in his favor,[18] but in that case it appeared that the evidence tended slightly to show that the unblocked frog which was used was better than the blocked one under the particular circumstances.

On the whole we adhere to the rule of the principal case. It is common knowledge that many customs widely adopted are productive of unfortunate results. Allowing one to justify himself for his own carelessness by setting up the carelessness of others is to our mind contrary to reason and justice.

PUBLIC USE IN EMINENT DOMAIN.

Eminent domain is the right of a sovereignty to take private property for public use.[1] The holdings of the courts as to what constitutes a public use resolve themselves into two classes:[2] one, adhering to a strict construction, holding that a use or right of use on the part of the public is an essential element;[3] the other, the more liberal view, holding that great public utility or benefit

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[17] *Kansas T. Coal Co. v. Brownlie,* 60 Ark., 582.

[18] *Southern Pac. R. Co. v. Seley,* 152 U. S., 145.

[1] *Hale v. Lawrence,* 21 N. J. Law, (1 Zab.) 714, 728; *Groff v. Bird-in-Hand Turnpike Co.,* 128 Pa. St., 621, 5 L. R. A., 661.

[2] 10 Am. & Eng. Ency., 1062; *Lewis on Eminent Domain* (3d Ed.), sec. 257.

[3] *Brown v. Gerald,* 100 Me., 351; *Board of Health v. Van Hoesan,* 87 Mich., 533; *Scudder v. Trenton Delaware Falls Co.,* 1 N. J. Eq., 694; *Varner v. Martin,* 21 W. Va., 534.